Supreme Court of the United States

OCTOBER TERM, 1936.

No. 530.

ROBERT PAGE WRIGHT, BANKRUPT, Petitioner,

versus

VINTON BRANCH OF THE MOUNTAIN TRUST BANK OF ROANOKE, VIRGINIA, AND A. C. HARRIS, TRUSTEE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF APPELLEES.

OPINIONS BELOW.

Robert Page Wright vs. *Vinton Branch of the Mountain Trust Bank, etc.*, 85 Fed. (2d) 973, Circuit Court.

JURISDICTION.

Certiorari was granted December 21, 1936, under Judicial Code Section 240 (A) as amended by Act of Congress, February 13, 1925.

QUESTIONS PRESENTED.

The only question presented is the constitutionality of sub-section (s) known as the Frazier-Lemke Act of August 28, 1935, [49 Stat. 942; 11 U. S. C. A. 203 (s)], which was added as an amendment to Section 75 of the Bankruptcy Act (6 s, 1-6).

This includes three special considerations among others:

(1) Whether subsection (s) is within the power of Congress to establish uniform laws "on the subject of bankruptcies".

(2) Whether this legislation is an attempt by the Congress of the United States to regulate or change property rights established by the laws of the State of Virginia as between appellant and appellees under the pretext of enacting laws on the subject of bankruptcy.

(3) Whether subsection (s) is so arbitrary and unreasonable in its operation on the vested rights of creditors as to violate the "due process" clause of the Fifth Amendment.

STATUTES INVOLVED.

The Statutes involved are set forth in Appendix A, page 34 (*infra*).

STATEMENT OF PROCEEDINGS.

On March 29, 1935, Robert Page Wright, a resident of Bedford County, in the Western District of the State of Virginia, filed as a former debtor his petition (with schedules) in the United States District Court for the Western District of Virginia, praying for relief under Section 75 of the Bankruptcy Act and that all proceedings "by way of *pending and advertised foreclosures* of his farming lands" be stayed. In his schedules he valued his real estate at $2,500.00 and showed that in addition to taxes of $153.06 he owed secured claims of $5,797.87. (Trans., pp. 1 to 4.)

On March 30, 1935, this petition was, pursuant to Section 75 of the Bankruptcy Act, as amended by Act of June 28, 1934, referred to the Conciliation Commissioner; and on July 27, 1935, the petitioner submitted a proposal for extension of time for paying his indebtedness for a period of twelve months from July 27, 1935, etc. In that proposal he suggested that an effort be made to interest buyers in purchasing some boxwood on his land. (Trans., pp. 4 and 5.)

On September 20, 1935, the conciliation commissioner filed his report stating the plan submitted by the debtor's attorney was not accepted but "it was agreed that Mr. Wright and his attorney should be given a reasonable time in which to determine the exact amount of boxwood (which was to be sold under the plan of extension offered) could be sold for and when it could be sold and to report back to the conciliation commissioner at which time he would call a second meeting of the creditors". Such report was not received and, therefore, no agreement having been reached, the commissioner reported the facts to the Court for further instructions. (Trans., p. 7.)

On September 28, 1935, the District Court ordered the debtor should within fifteen days file his amended petition under said Section 75 of the Bankruptcy Act as

amended by the Act of August 28, 1935, asking to be adjudged a bankrupt, or suffer his proceeding to be dismissed. (Trans., pp. 7 and 8.)

On October 8, 1935, the debtor filed his amended petition under Section 75, Sub-section (s), of the Bankruptcy Act, stating he had failed to obtain acceptance of his creditors to his proposal of composition or extension; that the schedules filed with his original petition contain a full and true statement of his debts and an accurate inventory of all his property; and praying to be adjudged a bankrupt and for all the benefits of said Sub-section (s) as amended, and approved August 28, 1935. (Trans., pp. 8 and 9.)

On October 12, 1935, said petitioner was adjudged a bankrupt upon said amended petition, and the matter was then again referred to the Conciliation Commissioner. (Trans., p. 10.)

On January 8, 1936, upon the motion of respondent, Vinton Branch of the Mountain Trust Bank, said District Court terminated the proceeedings before the Commissioner and dismissed the case on the ground that said Sub-section (s) of Section 75 of the Bankruptcy Act is unconstitutional for the reasons set forth by said Court in the *case of John Clayton Sherman.* (Trans., pp. 9, 10 and 11.)

The *Case of John Clayton Sherman* referred to by the District Court is *In Re Sherman et als,* reported in 12 Fed. Sup. at page 297. It will be seen that said Court there held that the Act in question was retroactive as to pre-existing debts and took away substantial property rights in specific property and especially (1) the right of a deed of trust creditor to determine when the foreclosure sale should be held, subject only to the discretion of the Court, and (2) the deed of trust creditor's right to control meanwhile the property during the period of default, subject only to the discretion of the Court, and to have the rents and profits collected and applied to his secured debt.

OPERATION OF SUB-SECTION (S).

Consideration of the constitutionality of this legislation makes necessary a very careful analysis of the contents of this Act. Sub-section (s) is preceded by Sections 2, 3, 4 and 5, which provide for an attempt on the part of a farmer to obtain a composition or extension of his obligations by consent of a majority in number and amount of his creditors. It is only when these preceding sections have expended their force that sub-section (s) is brought into operation. Such an attempt to obtain the consent of such creditor is, therefore, a prerequisite to the relief provided for in sub-section (s). The debtor having failed to obtain such consent, or as sub-section (s) provides, if he feels aggrieved by the composition and/or extension obtained, he may petition for the relief prayed for in sub-section (s). The procedure then provided for is as follows, the debtor's property is appraised, his unencumbered exemptions as provided for by the state law are set aside to him, and he is allowed to retain possession under the supervision and control of the court of all the remainder of his property. At this point either party (debtor or creditors) may file objections to the appraisals, and the Act provides that such objections may be filed within four months from the date the Referee approves the appraisal. The value of the property having been fixed by the appraisal, the court the enters an order setting aside the exemptions and granting the debtor the possession of the property; but the Act at this point provides that the debtor shall hold said property subject to existing mortgages and encumbrances. The court then enters an order staying all judicial or official proceedings in any court or under the direction of any official against the debtor or his property for a period of three years, provided, however, that the debtor must pay a reasonable rental for the property of which he has possession. But, the Act provides

that the first payment of such rental shall be made within one year from the date of the order staying proceedings. In other words, under the Act the creditor could not demand that the rental be paid in less than a year after the order staying the proceedings, and then the rental shall be paid into court for the payment of taxes and upkeep of the property, the remainder to be distributed among the secured and unsecured creditors as their interests may appear. It should be observed at this point that the payment of the rental is not a condition precedent to the operation of the Act, and the creditors have no security for the payment of the rental although the first installment is deferred for one year after the order is entered staying official or judicial proceedings. It should be likewise observed that the creditors are not consulted in the application of the rental, but it must be used for the payment of the taxes and the upkeep of the property before its application to the payment of the debt or interest thereon.

Following this, Section 3 of sub-section (s) outlines a plan whereby a debtor may pay into court the amount of the appraisal of the property of which he retains possession. If the debtor offers to do this, then a creditor may request a re-appraisal of the debtor's property to fix the value of the property, or, if the creditor insists, the court shall order the property sold at public auction in which event the debtor shall have ninety days to redeem any property sold at such sale by paying the amount at which any such property was sold, and the court then delivers to him full possession and title to such property, free and clear of all liens and encumbrances.

There has been some little confusion as to the correct interpretation of Section 3 of sub-section (s), but the lower courts have generally adopted this interpretation.[1]

[1] *In re* Young, 12 F. Supp. 30. "It is argued by the debtor that the second proviso of this paragraph gives the mortgagee the right to demand a sale of the mortgaged premises *at any time* after the court takes jurisdiction and therefore meets the constitutional objections pointed out by the Supreme Court in the Radford Case. With this reasoning we are not in

Obviously, if this section could be construed to give the creditor the right at any time to demand a sale at public auction, it would not only defeat the whole purpose of the Act, but would be in express conflict with the other provisions in this Act which expressly and directly command that all official proceedings against the debtor shall be stayed for a period of three years from the date of the entry of the order staying such proceedings.

There are several other very pertinent and interesting provisions of this Act. It will be noticed in the latter part of Section 4, sub-section (s), that first of all, if a receiver is in possession of the property of the debtor at the time relief is prayed for under this legislation such receiver shall be divested of possession and the property returned to the debtor. There are no provisions in the Act safeguarding the creditors against loss by such

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accord. To place such a construction on the language of paragraph 3 would do violence to the whole purpose of the act. Neither do we think that the congressional debates on the subject lend support to any such theory. While the language of the act is inapt and uncertain, it undoubtedly was the purpose of Congress to give the secured creditor the right to demand a public sale of the mortgaged property only when the preceding provisions had expended their force. If and when the debtor might evidence a purpose to pay into court the appraised price of the land, then and then only the secured creditor might, if he saw fit, ask for a new appraisement with the further proviso that he might, if he should so elect, demand a public sale. We think, as a matter of construction of the act, that the *time* of such sale is in no way dependent upon the wish of the secured creditor, but must await the time during the three-year period when the debtor shall choose to act. Surely Congress, in its attempt at relief of the distressed farmer, did not intend to bring about the anomalous result of reducing his redemption period from twelve months (in Ill.) to ninety days. If the construction contended for by the debtor should prevail, then the debtor himself might urge with some plausibility the unconstitutionality of the act in abridging his statutory period of redeemption. * * * We conclude, therefore, that the act in question destroys the right of the mortgagee to determine when a sale of the mortgaged premises may be had, subject only to the discretion of the court; and destroys the right during default to control the property subject to the discretion of the court and to have the rents and profits collected by a receiver for the satisfaction of the debt. These are property rights acquired by the mortgagee and cannot be taken from him without due process of law. The method attempted is not due process. Even the bankruptcy power of Congress must yield to the Fifth Amendment in this respect as pointed out in the Radford Case.

change of possession. There is no provision in the Act authorizing the continuance of such receivership, if such would be for the best interest of the parties concerned.

Likewise, Section 6 of sub-section (s) provides that this is an emergency measure, and if in the judgment of the court such emergency ceases to exist in its locality, then the court in its discretion may shorten the stay of the proceedings herein provided for and proceed to liquidate the estate. At this point it should be observed that the term "emergency" is not defined, and no guidance is given the court to determine whether or not an emergency exists in a particular locality.

Taking this legislation as a whole and analyzing its various provisions, the inquiring mind is forced to the conclusion that this legislation is designed for the relief of debtors, not with the view of giving the debtor a discharge, which is the primary function of bankruptcy legislation, but to go beyond the discharge and give the debtor rights, benefits and equities of *which he may have divested himself by contract with his creditor* or which the state law concerning mortgage instruments may have vested in the creditor.

Another singular fact concerning this legislation is this: This act deals with farmers who have mortgaged their property. Under such conditions the fundamental law of the land would indicate that they are the owners of the equity of redemption in their land only. This manner of ownership is not mentioned in this Act nor is their position as such recognized by the terms thereof. We make mention of this only to show how fundamentally this legislation departs from bankruptcy legislation.

(1) *Whether sub-section (s) is within the power of Congress to establish uniform laws "on the subject of bankruptcies".*

This court had occasion to consider similar legislation in the case of *Louisville Joint Stock Land Bank* vs.

Radford, 295 U. S. 555, and in its opinion enumerated five property rights of which the legislation in question deprived the creditor.[1] In that case, this court was dealing with property rights recognized under the laws of Kentucky. It is, therefore, necessary to inquire at this time whether the same rights exist under the laws of Virginia and to inquire whether or not in Virginia a lien creditor has any other or different property rights, and if so, whether they are impaired. In the case at present before this court, the record shows that the debt was secured by a deed of trust whereby real estate is pledged as security for the payment of the debt shown in the bankruptcy schedule. In Virginia a common law mortgage is rarely used, although the term mortgagor and mortgagee is frequently used in referring to the debtor and creditor relationship under a deed of trust. In Virginia the property is not conveyed to the creditor himself, but to a disinterested trustee, who upon default exercises the rights provided for by statute and by contract. Actually, the deed of trust imposes more severe obligations on the debtor and greater rights in the creditor than obtained under the law relating to common law mortgages, and the creditor possesses these rights in a far more positive form. Section 5167 of the Code of Virginia sets forth in detail the obligations, rights and duties imposed by a deed of trust. Inasmuch as this statute is directly involved in this case, Section 5167 of the Code of Virginia is set forth in full as Appendix B in this brief. The pertinent parts of this statute, however, are as follows:

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[1] "(1) The right to retain the lien until the indebtedness thereby secured is paid.

(2) The right to realize upon the security by a judicial public sale.

(3) The right to determine when such sale shall be held, subject only to the discretion of the court.

(4) The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale, or by taking the property itself.

(5) The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt."

"'Every deed of trust to secure debts or indemnify sureties, except so far as may be therein otherwise provided, shall be construed to impose and confer upon the parties thereto, and the beneficiaries thereunder, the following duties, rights and obligations in like manner as if the same were expressly provided for by such deed of trust, namely:

"'(1) The deed shall be construed as given to secure the performance of each of the covenants entered into by the grantor as well as the payment of the primary obligation.

"'(2) The grantor shall be deemed to covenant that he will pay all taxes, levies, assessments and charges upon the property * * * so long as any obligation upon the grantor under the deed of trust remains undischarged * * *.

"'(4) The grantor shall be deemed to covenant that no waste shall be committed or suffered upon the property * * *.

"'(6) In the event of default in the payment of the debt secured, or any part thereof, at maturity, or in the payment of interest when due, or of the breach on any of the covenants entered into or imposed upon the grantor, then at the request of any beneficiary the trustee shall forthwith declare all the debts and obligations secured by the deed of trust at once due and payable, shall take possession of the property and proceed to sell the same at auction at the premises (or at such other place as the trustee may select) upon such terms and conditions as the trustee may deem best, after first advertising,' etc."

It should be especially observed that under the Virginia law no proceedings in court are necessary to enforce a deed of trust. Upon notification by the holder of

the debt that there has been a default, the trustee proceeds to sell the property, and *pending sale may rent the property for the future protection of the creditor.* The sale by the trustee is absolute and final, and the sale will not be enjoined in Virginia so long as the trustee acts within the powers given him by the trust instrument or by state law. It is, therefore, evident that the position of the secured creditor in this case and in the Radford case are similar, with the exception that in this case under the Virginia law the rights of the creditors are more absolute in form and the exercise of those rights are not subject to the discretion of the court.

The Hon. John Paul, District Judge for the Western District of Virginia, in the case of *In re* Sherman, 12 F. Supp. 297, in an unusually well considered opinion, not only compared the rights of a secured creditor in Virginia with the rights of a secured creditor in Kentucky and found that the secured creditor in Virginia had far more positive rights. He also applied the amended Frazier-Lemke Act now under consideration to these rights and decided that this legislation deprived the lienor of No. 2 and No. 5 of the enumerated objections to the original Frazier-Lemke Act set forth in the Radford case, specifically holding that this legislation violated the right of the creditor to realize upon the security by a judicial public sale and the right to control the property during the period of default, and to have the rents and profits collected by a receiver for the satisfaction of the debt.[1]

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[1]In the opinion "*In re* Sherman, 12 F. Supp. 297, the learned Judge of the District Court for the Western District of Virginia said of the Virginia statute in considering the constitutionality of the Frazier-Lemke Act here under consideration: "We may assume that the provision of the new Frazier-Lemke Act compelling an ultimate public sale of the property upon request of any secured creditor protects certain of the rights which were taken away by the old act; namely, the first, second, and fourth of the rights set out in the opinion in the Radford Case. But even if this be true, it seems clear that the amended act, equally with the original, threatens those rights which the Supreme Court enumerated as 3 and 5. These are in substance the right to determine when a sale shall be held and the right

This court held in the Radford case (*supra*), as it has very frequently held, that the bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment. In this opinion it is pointed out that under the bankruptcy power Congress may discharge the debtor's personal obligation, because unlike the states, it is not prohibited from impairing the obligation of contracts, but the taking of substantive rights in specific property acquired prior to the Act is expressly forbidden.

As a practical proposition, under the operation of this Act some time will be occupied, perhaps several

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to control the property during default, pending the sale. In the Radford Case it was said that the creditor possessed these rights under the Kentucky law, subject only to the discretion of the court. In Virginia, the same rights exist in more absolute form, for their exercise is not subject to the discretion of any court, unless, it may be, they were exercised in such an oppressive or wasteful manner as to constitute a fraud upon the rights of the debtor and thereby call for restraint by the court in an independent suit instituted for that purpose.

It will be noticed that in Virginia the trustee takes possession of the property at such time and place and upon such terms and conditions as he sees fit. It seems clear that the right to determine when a sale shall be held and the right to control the property pending a sale are abrogated by the Frazier-Lemke Act, even since its amendment. That act specifically provides that possession of the property shall remain in the debtor, and that all proceedings shall be stayed for a period of three years. That these provisions are subject to compliance with conditions imposed by the court does not lessen the fact that they take away rights previously vested in the creditor.

The most that can be said is that the amended act preserves the right to retain the lien until the debt is paid, and to that end provides for a public sale at which the creditor himself may bid, and by bidding may, if necessity arises, take over the property itself. But the right to compel such a sale is delayed for a period of three years or until such time within that period as the debtor may determine by offering to pay the appraised value of the property. The property remains in possession of the debtor subject only to such supervision as to its handling as a court may be able to give and subject to the payment of a reasonable rental. During this period the value of the property may decrease while the indebtedness increases through accumulated interest. The first installment of rent is not payable until the end of one year, so that for at least a year the creditor must sit by while his debt accumulates with no assurance that at the end of that time the debtor will be able to fulfill the obligations imposed upon him, or that he will not deliberately fail to do so."

months, in attempting to secure the relief provided for in the sections preceding sub-section (s) in regard to a composition or extension of the debtor's obligation with the consent of the creditors; then, when a petition is filed praying for the relief outlined in sub-section (s), a further period of months will be consumed in having the property appraised and putting the debtor in the position he must occupy before the stay is granted. It should be remembered that there is a four-months' period which would prolong the delay wherein he is given time to object to the appraisement. Then should the official and judicial procedure be stayed for a period of three years, no rent will be paid for one year, as the payment of rent is not a condition precedent to the operation of the Act; therefore, if we compare the position of the creditor under the Virginia law prior to the passage of this Act with his position subsequent to the passage of this Act, it is graphically shown that not only is the application of the security to the payment of the debt deferred for three or more years, but the rents and profits are diverted from him for one year or more, and *even then the rental is paid on taxes and the upkeep of the property in derogation of his rights.*

It is therefore submitted as a simple, practical proposition that the creditor has suffered a loss that may be, and is in this case, very substanial, and this legislation should be stricken down as was done in the case of *W. B. Worthen Co., etc.* vs. *Kavanaugh*, 295 U. S. 250, in which case it appeared that substantially the same substantive rights had been abridged.

(2) *Whether this legislation is an attempt by the Congress of the United States to regulate or change property rights established by the laws of the State of Virginia as between appellant and appellees under the pretext of enacting laws on the subject of bankruptcy.*

The rights of a secured creditor in Virginia have been heretofore shown. In bankruptcy proceedings gen-

erally the law governing the validity of mortgages and other liens and also as to ownership and interest in property has been definitely fixed as that of the locality in which the property is located.[1]

The demarcation between state and federal powers in regard to such matters and the departure of this legislation from such principles is brought into bold relief by considering the case of *Cox* vs. *Wallace*, 219 Fed. 126, wherein it was held that if the law of the State of Virginia permits the husband to convey property directly to his wife and thereby divest himself of any interest therein, then the bankruptcy court will recognize such law in controversies affecting the bankrupt's property.

While it has been long recognized that Congress has the right through bankruptcy legislation to modify in some respects the remedies available to lien-holders, yet it has been equally clear through the decisions of the courts that Congress has no power under the Bankruptcy Act to modify or impair the interest of secured creditors in mortgaged property.[2]

It appears obvious that by comparing the creditor's position after the act takes effect with his position prior to the operation of the act that the creditor by the operation of this act has suffered a change of position to his detriment and that the estate of the debtor has been enlarged thereby. This is true because while the property is in the possession of the debtor under the supervision and control of the court the net amounts received by the creditor on the debt through rental will be less than what he would receive with the trustee in possession, and in addition to that, sale is delayed by its operation. Therefore, this legislation does constitute an attempt by the

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[1] Remington on Bankruptcy, 4th Ed. 1405.
McCormick vs. *Sullivant*, 10 Wheat. 192.
U. S. vs. *Butler*, 56 Sup. Ct. 312.
U. S. vs. *Fox*, 94 U. S. 315.
Bailey vs. *Drexel Furniture Co.*, 259 U. S. 20.
Linder vs. *U. S.*, 262 U. S. 5.
Cox vs. *Wallace*, 219 Fed. 126.

[2] *Continental Illinois National Bank and T. Co.* vs. *Chicago, etc.*, 294 U. S. 648.

Congress of the United States to regulate or change the property rights established by the laws of the State of Virginia between the debtor and creditor.

(3) Whether sub-section (s) is so arbitrary and unreasonable in its operation on the vested rights of creditors as to violate the "due process" clause of the Fifth Amendment.

The guarantee of due process of law as provided for in the Fifth Amendment has long been recognized as one of the most important provisions of the Constitution of the United States.[1] Moreover, it has been said that without it the right of private property could not be said to exist in the sense which it is known to our laws.[2] Because of this fact, the provisions embodied in this guarantee have received a very broad and liberal interpretation.[3] In its construction, it in effect prohibits the taking of one person's property and giving it to another, contrary to settled usages and modes of procedure, and *such unlawful taking of one's property can never be defended as an exercise of the police power.*[4]

As a matter of fact, this provision was inserted in the Constitution for the purpose of imposing a limitation upon the powers of the National Government.[5] It was, therefore, pursuant to this legal principal that this court in the Radford case (*supra*) declared that the bankruptcy power of Congress, like all of the great substantive powers thereof, was subject to the limitations imposed by the Fifth Amendment.

It has been settled, for example, that any legislative body cannot invest a court with power to divest an owner of his property without compensation whenever in the exercise of its discretion it sees fit to do so.[6]

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[1] *Ulman* vs. *Baltimore*, 72 Md. 587; 20 Atl. 141.
[2] *Ochoa* vs. *Hernandez, etc.*, 230 U. S. 139.
[3] *People* vs. *King*, 110 N. Y. 418; 18 N. E. 245.
[4] 24 L. R. A. 152.
[5] *Munn* vs. *Illinois*, 94 U. S. 113.
[6] 2 Ann. Cas. 315; 67 L. R. A. 969.

It is therefore submitted in the light of this reasoning that sub-section (s) should be stricken down as contravening the requirements of the due process clause of the Fifth Amendment.

The effect of the operation of this Act on the rights of a secured creditor has been shown heretofore in this brief. The creditor's detrimental change of position may, however, be more forcibly shown by examining the effects in this particular case. On page 3 of the Record, the debtor by his own valuation estimates the value of his assets at $2,882.50. The same schedule shows debts of $6,559.50, a large part of which is owed to the appellees herein. This record further shows that this debtor first petitioned for relief under the original Frazier-Lemke Act, since invalidated, by filing a petition March 29, 1935. His petition asked that proceedings for foreclosure by appellees be stayed, which as shown by the record, was done. The order of reference was entered March 30, 1935, but it was not until September 27, 1935 (p. 5 of the record) that a proposal was made to the creditors. The original Act having been invalidated and a new law passed in August, 1935, on October 8th this debtor petioned for further relief, and on October 12, 1935, the matter was again referred to the conciliation commissioner. On Jan. 8, 1936, the Hon. John Paul, District Judge, ordered the case to be dismissed on the grounds that sub-section (s) was unconstitutional, and thence it has come on appeal.

Should the constitutionality of this legislation be upheld, a further order will have to be entered staying foreclosure proceedings for a period of three years, and this will be done in spite of the fact that *the bankruptcy schedule shows no possible hope of solvency and contains no possible basis for a financial rehabilitation as is claimed as the great objective of this Act.* Furthermore, in case this legislation is upheld, there will be more than another year elapsed before any rental will be paid, at which time there will be additional taxes due and owing and a strong probability of diverting the income from

the property for the purposes of making repairs as provided for in the Act. Therefore, as a practical proposition, from the facts presented in this case, the operation of this legislation will postpone almost indefinitely payment to the secured creditor represented in this case as the appellees, whereas under the law of Virginia the trustee has an immediate right of possession, and the beneficiary has an absolute and immediate right to demand sale of the property for payment of the debt. A careful inquiry into this particular situation leads to the very strong conviction that this is just such a situation as the Fifth Amendment was designed to prevent.

If the rule laid down in this court in the *Home Building & Loan Assoc.* vs. *Blaisdell*[1] and the Radford Case is correctly understood, it clearly asserts that while the mortgagee is debarred from actual possession, he should have, so far as rental value is concerned, the equivalent of possession during the extended period. In addition to this, he should have his interest carefully safeguarded. An examination of the facts in the case now under consideration would clearly indicate that neither is true under the operation of this Act, inasmuch as the creditor does not receive the equivalent of the rental and his interest in the property is not safeguarded as is explained heretofore in this brief.[2]

ANSWER TO LAW CONTAINED IN BRIEF OF COUNSEL FOR PETITIONER.

On page 12 of counsel's brief, point is made of the power of the Bankruptcy Court to have encumbered property sold free of liens. This, of course, has been

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[1] 290 U. S. 398.

[2] N. Y. U. Law Quarterly Rev., p. 465 (Mar. 1936).

46 Harvard Rev.

In re Lowman, 79 Fed. (2d) 887, in which the court said, "Federal courts may be authorized to assume jurisdiction over and to administer property of bankrupts, but they must administer that property as they find it, and they have no power to create new rights for the benefit of either debtor or creditor."

well recognized as a power of the Bankruptcy Court and does not contain any principle of law helpful to the constitutionality of the legislation under consideration. As was observed in the Radford case (*infra*), such sales are held when it is to the interest of other creditors, and it is a settled principle that sale of encumbered property will not be ordered by the court if the amount of the liens exceeds the value of the property.

Pages 19 to 26 and at other points in the brief, counsel for the petitioner attempt to compare the Frazier-Lemke Amendment to Sections 77 and 77B of the Bankruptcy Act under which this court in the case of *Continental Illinois Nat. Bank and T. Co.* vs. *Chicago, etc.*, 294 U. S. 648, decided that the secured creditors were not deprived of such vested rights as would render Section 77B unconstitutional, and that the constitutionality of Section 77B had never been successfully attacked. It is apparent that they are putting great reliance on the last-mentioned decision. As a matter of fact, the same contention appears to have been made in regard to the constitutionality of the original Frazier-Lemke Amendment, and this court, in the Radford Case, clearly pointed out the error of this reasoning and the distinct difference between the Frazier-Lemke Amendment and Section 77 and 77B of the Bankruptcy Act. In the Radford Case, this court disposed of this contention as follows:

> "Nor do the provisions of the bankruptcy acts concerning compositions afford any analogy to the provisions of Sec. 7. So far as concerns the debtor, the composition is an agreement with the creditors in lieu of a distribution of the property in bankruptcy—an agreement which 'originates in a voluntary offer by the bankrupt, and results, in the main, from voluntary acceptance by his creditors.' (Citing cases). So far as concerns dissenting creditors, the composition is a method of adjusting among creditors rights in property in which all are interested. In ordering the adjustment, the bankruptcy court exercises a power similar to that long exercised

by courts of law (citing cases), and of admiralty (citing cases). It is the same power which a court of equity exercises when it compels dissenting creditors, in effect, to submit to a plan of reorganization approved by it as beneficial and assented to by the requisite majority of the creditors (citing cases). In no case of composition is a secured claim affected except when the holder is a member of a class; and then only when the composition is desired by the requisite majority and is approved by the court. Never, so far as appears, has any composition affected a secured claim held by a single creditor. Compositions are comparable to the voluntary adjustment with the mortgagee provided for in Sec. 3 of the Frazier-Lemke Amendment. They are not analogous to the so-called adjustment compelled by Sec. 7."

In addition to this, it is submitted that the contrast is even larger because of the fact that Sections 77 and 77B follow general principles in that dealing with a large number of creditors as a class is the only possible way the court could deal with them. Also, under this legislation, what is done is for the best interest of the creditors, there being a consent of a two-thirds majority in number and amount, and while this legislation may modify or somewhat restrict the rights of secured creditors, there is no analogy whatever with respect to the Frazier-Lemke Act for the simple reason that sub-section (s) of Section 75 operates against the consent of the secured creditor and the restriction of his rights is against his will; whereas the restriction on the rights of the secured creditors under Sections 77 and 77B are in accordance with his will, as expressed by a majority of the creditors of his class.

Particular attention is called to the fact that in regard to railroad reorganization legislation the court is concerned with a public utility, the bonds of which have been purchased by the public with full knowledge of the type of business it operates and with full notice of the fact that public interest requires its continual and unin-

terrupted operation. The whole theory of corporate reorganization and composition or extension provisions under Section 75 of the Bankruptcy Act is based on the fact that a two-thirds majority in number and amount of any one class of creditors is permitted to determine what shall be done for the best interest of the debtor. As a practical proposition this is the only way the court can effectively protect the interest of such secured creditors. As a matter of law it is not true as is stated in the fourth paragraph, page 71, of petitioners's brief that "What Congress can do to one-third or a majority under the Constitution it can do to all of the creditors". This statement fails to take into consideration the well-established equitable principles that following the consent of the majority is, in effect, the same as following the individual consent of each secured creditor.

Exception is likewise taken to the statement contained in the latter part of the third paragraph, page 25, of said brief that the Constitution recognizes neither majorities nor minorities and most assuredly, the due process clause doesn't." The Constitution may not recognize majorities and minorities, but most assuredly the due process clause has been interpreted so as to give such recognition.[1] It, therefore, does not follow, as is stated in the first paragraph on page 6 of said brief, that Sections 77 and 77B and the Frazier-Lemke Amendment must stand or fall together under the Constitution.

Exception is taken to the statement of said counsel on page 44, Paragraph 4, that Congress has the same police power within the grants of power enumerated in the Constitution as the states have within their reserved powers, and that wherever the Federal Government has police power it is precisely the same police power that the states exercise. This Court has already answered this in the Radford Case when it said that the bankruptcy power of Congress is limited by the Fifth Amendment.

[1] *Head* vs. *Amoskeag Mfg. Co.*, 113 U. S. 9; *Shaw* vs. *Little Rock and Ft. S. R. Co.*, 100 U. S. 605.

As a matter of logic, this is precisely the same thing as saying that two columns of figures will equal each other without arriving at the total. Because the sources of these two powers are entirely different, the necessities occasioning their exercise are not in common and the reasons and principles for the limitation of these two powers are almost the exact opposite in these two cases. It is well established that Congress has no police power within the grants of the powers enumerated in the Constitution except insofar as such powers are incidental to the exercise of some power delegated in the Constitution.[1]

Following this paragraph on Page 44, in the next paragraph, it is stated that wherever sovereignty goes police power goes to the full limits of the sovereignty without restraint. It would seem that this statement is misleading in that the police power, to be exercised by Congress, must be incidental and an attribute of sovereignty in order to be enjoyed by the Federal Government. It is then submitted, in the sixth paragraph on page 53 of said brief that the Frazier-Lemke Amendment is valid under the power of Congress to legislate federal police power incidental to the subject of bankruptcies. Now this is subject to two severe criticisms: (1) It removes the restraint on Congress that any legislation on the subject of bankruptcies must be subject to the restraint imposed by the Fifth Amendment to the Constitution or the due process clause (Radford Case, *supra*). (2) It fails to show that the Frazier-Lemke Act is in the nature of a police power or is incidental to the bankruptcy powers of Congress. Counsel cite the *Home Building & Loan Assoc.* vs. *Blaisdell Case*, 290 U. S. 231, on page 54 of their brief and at other points. It is submitted that to compare the Frazier-Lemke Act with the Minnesota Moratorium Case is to assume that the Fourteenth Amendment imposes the exact restraints upon the State Governments as the Fifth Amendment imposes on the National Government. Such is not the case and no valid reasoning can be produced to substantiate this conten-

[1] *Hamilton* vs. *Ky. Distilleries*, 251 U. S. 246.

tion. An emergency may enlarge the police power of the state because it is only in the event of an emergency that it is needed, but as was pointed out by this court in the Blaisdell Case and the case of *U. S.* vs. *Schechter, etc.*, 295 U. S. 495, an emergency does not create or enlarge constitutional power, although it may be the occasion for the exercise of such constitutional power already possessed. In regard to such police power the relief must be appropriate to the emergency and be based upon reasonable conditions. On the other hand, as regards the bankruptcy power of Congress, since it is limited by the Fifth Amendment an emergency does not enlarge the power of Congress under this clause of the Constitution.

As a matter of fact, if the Blaisdell Case is carefully considered, it is found that the Minnesota Moratorium gave the asecured creditor far more than sub-section (s) gives such creditor, because under the Minnesota law, while the mortgagee is debarred from actual possession, he receives the equivalent of possession by a rental paid on taxes, interest and insurance. Also, under the Minnesota law, the moratorium was never granted for a stay of more than two years, instead of three years as was provided for in the Frazier-Lemke Act. In other respects, the Minnesota law safeguards more adequately the rights of the secured creditor.

DECISIONS IN THE UNITED STATES DISTRICT AND CIRCUIT COURTS.

A review of the decisions in the United States Circuit shows that three courts (the Fourth Circuit, the Seventh and Eighth Circuits) have held this act unconstitutional, while one United States Circuit Court, in the Fifth Circuit, has held this act constitutional.[1] On the other hand, ten United States District Courts, not counting the decision of the District Court in the case now under con-

[1] *Dallas Joint Stock Land Bank* vs. *Davis*, 83 F. (2d) 322.

sideration, have held this act unconstitutional[1] as against seven decisions of the District Courts which have held this act constitutional.[2] Special attention is is called to the decisions of the United States Circuit Court, especially the Lowman Case reported in 79 Fed. (2nd) 887, wherein the effect of this legislation is very carefully considered, and the court made this statement: "Federal Courts may be authorized to assume jurisdiction over and to administer property of the bankrupts, but they must administer that property as they find it and have no power to create any rights in it for the benefit of either debtor or creditor".

In the Lowman case (*supra*) and the case of *U. S. Nat. Bank of Omaha* vs. *Pamp,* 79 Fed. (2nd) 887, this act is construed as not allowing the creditor the right to demand a sale at public auction until the debtor chooses to redeem as provided for in the statute. In other words, the court said that the stay is for a period of three years, subject to being shortened by the mortgager at his uncontrolled discretion. This holding is typical of the cases holding against the validity of the Act. It is followed by the finding that while the new legislation may sufficiently secure the mortgagee's right to retain his lien until payment of his debt, to realize upon the security at a judicial public sale, and his right to protect his interest by bidding at such a sale, yet the mortgagee is *unlawfully deprived of his right to determine when such sale shall take place and his right to possession of the property through a receivership or otherwise pending the sale.*

In the Slaughter case (*supra*) the Act was held con-

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[1] *Wright* vs. *Vinton Branch of the Mountain Trust Bank,* 4 U. S. Law Week 129; *In re* Sherman, 12 F. Supp. 287; *U. S. National Bank of Omaha* vs. *Pamp,* 83 F. (2d) 493; *Lafayette Life Insurance Co.* vs. *Lowman,* 79 F. (2d) 887; *In re* Maynard, 15 F. Supp. 809.

[2] *In re Slaughter,* 13 F. Supp. 893, 12 id. 206; *In re Bennett,* 13 F. Supp. 353; (1936) 4 Geo. Wash. L. Rev. 525, cert. den. Oct. 12, 1936; 4 U. S. Law Week 124; *In re Cole,* 13 F. Supp. 283; *In re Reichert,* 13 F. Supp. 1; *In re* Paul, 13 F. Supp. 645; *In re* Williams, 12 F. Supp. 206; *In re* Chilton, 16 F. Supp. 14.

stitutional, but the Court said "a study of the decision of the Supreme Court in the *Louisville Bank* vs. *Radford,* decided May 27, 1935, does leave some doubt as to the validity of the present Act, but the doubt is not of sufficient degree to give rise to that conviction which a trial court should have before declaring an Act of Congress unconstitutional". This same hesitancy is also shown by District Courts in the Bennett and Cole Cases (*supra*).

The importance of the decisions of the United States Circuit Courts of Appeals would seem to justify setting out the facts of these cases more fully:

THE LOWMAN CASE.

The first United States Circuit Court of Appeals to hold this act unconstitutional was the Seventh Circuit in the case of *Lafayette Life Insurance Company* vs. *Lowman,* 79 Fed. (2nd) 887. In that case the Insurance Company commenced suit for the foreclosure of a mortgage on farm lands in a state court of Indiana in January, 1933. After a decree of foreclosure, the land was sold August 5, 1933. Under the Indiana statutes a certificate of purchase was issued and the owner of the land had one year from the date of the sale in which to redeem. No deed could be executed during this redemption period. Further proceedings were then withheld by operation of the original Frazier-Lemke Act, and finally, in Octobr, 1935, the proceedings were continued by the Referee for administration under the 1935 Frazier-Lemke Act. Objections to these proceedings were made because of the constitutionality of this present Act, and an order was entered dissolving an injunction which restrained the sheriff of Benton County, Indiana, from issuing a deed pursuant to the certificate of sale. In other words, the District Court held the Act unconstitutional, and an appeal was obtained to the Circuit Court.

The United States Circuit Court of Appeals declared the Act unconstitutional, and in a very well considered opinion the court determined that there was nothing in the Constitutional clause conferring upon Congress the control of bankruptcy proceedings which would authorize it to change property rights already created by the states.

THE PAMP CASE.

The second United States Circuit Court of Appeals decision which held this Act unconstitutional was from the Eighth Circuit in the case of *United States National Bank of Omaha* vs. *Pamp,* 83 Fed. (2d) 493. This was an appeal from an order granting the application of a debtor to reinstate his position under the amended Frazier-Lemke Act and staying foreclosure proceedings under the law in the state of Nebraska. In this case the property had been sold, but the sale had not been confirmed by the court. In reversing the District Court, the Circuit Court held that the legislation unlawfully took from a secured creditor a vested right, saying in part "there is no escape from the conclusion that the mortgagee creditor is deprived of his substantial right by this Act, in that the right to determine when a sale shall be held, subject to any discretion the court may have, is taken from the court and vested in the mortgagor who may enforce a delay of at least three years. While this opinion is based somewhat on the authority of the Lowman Case, it very definitely shows a careful examination of the law and the facts involved and reveals that the court arrived at its decision independent of the Lowman Case by applying well-recognized constitutional principles to the matter under consideration.

THE WRIGHT CASE.

The third United States Circuit Court to hold this Act unconstitutional was the Fourth Circuit, in the case now under consideration and from which an appeal was had to this court to attempt a reversal. This opinion is a part of the record in this suit and reference is made to it for a complete account of the decision. It will be found, however, that this court found in substance that the laws of Virginia are not materially different from the rights recognized by the law of Kentucky, as set forth in the Radford Case, and that the law of Virginia gave the creditor rights which were unlawfully taken away by the Frazier-Lemke Act. Also, the court found that the emergency provision in the Act was unsatisfactory in that in extending its benefits to some judicial districts of the court and not to others it destroyed the uniformity requirement necessary for Congress to enact laws on the subject of bankruptcy.

There are many forceful opinions delivered by the various district courts concerning this legislation and holding the same unconstitutional. Some of the outstanding opinions are as follows: *In re* Young, 12 Fed. Supp. 30; *In re* Lindsay, 12 F. Supp. 625; *In re* Sherman, 12 F. Supp. 297; *In re* Davis, 13 F. Supp. 221.

NECESSITIES FOR THIS LEGISLATION.

That there has been much distress and financial losses among farmers is admitted by every one. It has not, however, been satisfactorily shown that their financial distress was greater than perhaps other large classes of people. Also, that there has been considerable recovery of the farmer is likewise evident. It is likewise pointed out that it has been the loss of income on the part of the farmer that has occasioned the entire difficulty. The Frazier-Lemke Act does not, of course, help the farmer except as to his finances, and then only by giving him a period of grace on his obligations. It does

not even go so far as to refinance his debts in any permanent way so as to advance him along the road to financial rehabilitation. Actually, a farmer burdened with debt is more in need of relief by having his debts refinanced than he is in receiving a moratorium on payments. The fact that he is already in arrears in his payments is perhaps evidence of the fact that his obligations are either too large or his payments are not commensurate with his income.

It is a matter of public record that the Federal Government has already enacted some very liberal legislation for the relief of the farmer in the Farm Credit Administration, the Home Owners Loan Corporation, and through the Land Bank Commissioner loans, as well as loans to co-operative associations. It has been pointed out by many thinking experts that the ultimate effect of the Frazier-Lemke Act might be to so restrict credit of farmers as to do them harm instead of good. Mr. John Hanna, who is a visiting professor of law of the University of Missouri, has written a very valuable and enlightening article on the new Frazier-Lemke Act, which appears in the January, 1936, issue of the Missouri Law Review. On page 16 of this review, Mr. Hanna states as follows:

> "If the second Frazier-Lemke Act is declared unconstitutional by the Supreme Court the real effect on the farm population as a whole will be negligible. If such a law were constitutional and were in effect for any considerable period it is by no means certain that its net effect would be good. There is little doubt that it would diminish the attractiveness of the farmer as a credit risk. Even government financing agencies so long as they are operated on a business basis, and especially where they depend upon the investment market for funds, would have to take the Frazier-Lemke Act into account. The reaction of private lenders would be more promptly felt, either in refusals to lend to farmers at all or in increased interest rates and other charges.

The financial state of farmers as a whole was never as desperate as one might have supposed who listened only to the professional and other friends of the farmer. Not all farm land is mortgaged. In Story County, Iowa, in 1931, for example, 59 per cent of the farm land was mortgaged.[1] Not all mortgages are or ever were in default. Except for temporary defaults due to the banking holiday in 1933, mortgage defaults in the country as a whole even during the depression ranged from 2 to 6 per cent annually.[2] The operations of the Farm Credit Administration have put many farm obligations on a long term low rate basis where the farmer is easily able to carry the load. The activities of the A. A. A. and the improvement in business have greatly increased the farmer's income.[3] Many voluntary adjustments of farm debts have been made by creditors, some coerced perhaps by fear of the Frazier-Lemke Act, but not legally dependent upon it, and now established. Certain regions lately affected by drought or other calamity still need rehabilitation and isolated individuals are still financially oppressed. So far as bankruptcy can help such situations at all, it is likely that what is needed are regular bankruptcy proceedings rather than moratoria. One finds a confirmation of this in many cases filed under Section 75. The petitioners are often

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[1]Wallace G. Murray, An Economic Analysis of Farm Mortgages in Story County, Iowa, 1854-1931 (1933) Iowa Agri. Research Bull. #156.

[2]The Yearbook of Agriculture (1935) 692, gives the following figures showing the number of farms per 1,000 changing hands as a result of forced sales or other defaults. The figures follow:

	United States	West North Central States
1930	20.8	27.5
1931	26.1	31.3
1932	41.7	47.1
1933	54.1	59.5
1934	39.1	40.7

The West North Central region comprises Minnesota, Iowa, Missouri, North and South Dakota, Nebraska and Kansas.

[3]The United States Department of Agriculture estimates of farm income for the past three years are as follows:

1932	$4,328,000,000
1933	4,868,000,000
1934	5,950,000,000

persons who have no reasonable likelihood of working out of their difficulties in three or five years or ever. Their only chance is to start again quite at the beginning.

Mr. Hanna further states in this article that this legislation is an insignificant item in the work of farm rehabilitation. He estimates that perhaps less than ten thousand cases have been filed, and that in only a minor fraction of these cases does it make any permanent difference whether or not he obtains such a moratorium.

The relative unimportance of this legislation is shown by the fact that while 9,187 cases have been filed under Section 75 in about four-fifths of the judicial districts,[1] during approximately the same period the Farm Credit Administration handled 1,000,000 loan applications.[2]

Counsel for petitioner, in their brief, page 34, paragraph 2, state that during the first eight months of 1936 the Farm Credit Administration has foreclosed or arranged to foreclose 30,627 farm mortgages. Attention is called to the fact that these foreclosures are handled

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[1]10 J. Nat. Ass'n Referees in Bankruptcy 23 (1935).

[2]By its second anniversary on May 27, 1935, the Farm Credit Administration had made advances and grants of about $3,000,000,000 to American farmers or an average of about $4,000,000 a day since its organization. This includes the drought relief funds, and crop production loans, and loans to co-operatives, as well as the Land Bank and Land Bank Commissioner's loans. Farm mortgage loans by the 12 Federal Land Banks and the Land Bank Commissioner aggregate $1,725,000,000. Counting the loans made by Land Banks prior to the establishment of the Farm Credit Administration, such mortgage loans are in excess of $2,000,000,000. Farmers used about 90 per cent of the money lent on farm mortgages to pay their creditors. Commercial Banks received over $400,000,000, insurance companies $235,000,000, joint stock land banks $125,000,000, state and county tax authorities $50,000,000 and individuals and other unclassified creditors $725,000,000. Applications for new loans are being received in greatly reduced volume from the peak periods in 1933 and 1934. (Figures are from the Second Report of the Farm Credit Administration.)

In connection with the amount of new farm credit, attention is invited also to the recent statement of Mr. Rexford G. Tugwell, Undersecretary of Agriculture, that 150,000 voluntary adjustments of farmers' debts had been effected in the past two years.

under a law passed by Congress and that Congress could revise this legislation so as to benefit far more farmers than would be benefitted, according to Mr. Hanna's figures above set forth, by upholding the Frazier-Lemke Act. It is submitted, however, that whatever may be the needs of the farmers in this respect, holding this legislation constitutional would probably bring hardships on many creditors as well as governmental agencies. But above all else, as was said by this court at the conclusion of the opinion in the Radford Case, the "Fifth Amendment commands that however great the nation's need, private property shall not be thus taken for a wholly public use without just compensation". It is further stated that "if the public interest requires and permits the taking of the property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain, so that through taxation the burden of the relief afforded in the public interest may be borne by the public.

UNIFORMITY REQUIREMENT DESTROYED BY EMERGENCY CLAUSE.

This Act is described as emergency legislation and provides that "if in the judgment of the court such emergency ceases to exist in its locality, then the court in its discretion may shorten the stay of proceedings herein provided for and proceed to liquidate the estate". It will be noticed that the term "emergency" herein used is not defined.

Webster defines an emergency as "a sudden or unexpected occurrence or combination of occurrences demanding prompt action".

It is, therefore, obvious that under this section a Federal court would clearly be called upon to examine the economic welfare of each locality and inquire into its financial wellbeing to determine whether or not the Frazier-Lemke Act should be enforced. This obviously will

lead to a state of confusion wherein this legislation might be enforced in some states and not in others, in some counties and not in others, and in some judicial districts and not in others. The uniformity required by the Consituation has been held to be a geographical uniformity. (*Leidight, etc.*, vs. *Tengel*, 95 Fed. 637). Two district courts have examined this part of the legislation and have found that it leaves the status of the emergency too vague and undefined.[1] Also, the Circuit Court in the present case said in regard to this provision, "It would seem that such a provision violates the constitutional requirement of geographical uniformity and would be void for that reason, even if not given the effect of invalidating the remainder of the Act.

It should be noted at this point that this statute does not contain a "separability clause", and for this reason this court has no aid in determining the legislative intent. It is, however, very important to denote that the term "emergency" herein is made to embrace the entire subsection (s) in that the whole Act is declared to be an emergency measure. In the absence of the separability clause this court cannot definitely determine that Congress meant this Act to operate independent of the emergency provisions.

In the case of *Crowell* vs. *Benson*, 285 U. S. 22, this court sustained in part a compensation act containing a separability clause. This act contained provisions authorizing conclusive findings of fact by an administrative body. This was objected to because certain facts were jurisdictional and under the Constitution must be decided independently by the judicial department. This court upheld the act as a whole, but found this part of the act unconstitutional. The court was able in interpreting this act to find that there was no violation of the purpose of Congress in sustaining the remaining part of the act. This court, however, in separating the emergency measure from subsection (s) must go far beyond

[1] *In re* Schoenleber 13 Fed. 375; *In re* Tschoepe, 13 Fed. 371.

the rule laid down in the Crowell case because the emergency clause defines and qualifies the entire subsection (s) and the court cannot therefore say that Congress would have enacted this legislation without the emergency provision; and further, that it was the purpose of Congress for this act to operate independent of the emergency provision. Moreover, the nature of the act throughout qualifies it as emergency legislation. Therefore, should this court strike down the emergency clause, it will, in effect, be creating an entirely different type of legislation, which, of course, is the function of a legislative body and not a court.

At this point it should be observed that one district court found objections to this legislation as not being uniform bankruptcy law, in that it applies only to farm mortgages, and so only to a special class of debtors. *In re* Davis, 13 F. Supp. 221.

CONCLUSION.

We have sought herein first of all to show what rights the creditors are given by the law of the State of Virginia—that these rights are definite and that upon default in the payment of the debt secured, these rights may be immediately exercised by the creditor—that Congress has plainly and clearly exceeded its powers as restrained by the Fifth Amendment in passing legislation which so clearly abrogates these rights and divests the secured creditor of the right to possession and the right to demand payment of his debt by application of the security.

We have not sought in this brief to ask this court for a conservative constitutional construction, but we have attempted to show that the Constitution itself forbids this legislation by the provisions therein whereby it is provided that any person shall not be deprived of his property without due process of law and that private property shall not be taken for a public purpose without just compensation, and that bankruptcy laws must con-

tain geographical uniformity and have a reasonable relevancy to the subject of bankruptcy. It is believed that the principle we have sought to sustain in this brief is a principle that is essential to National integrity—that in asking that this legislation be stricken down as unconstitutional we are simply calling for a new application of constitutional principles demanded by modern conditions.

The harm this legislation might actually do the farmer could be enlarged upon indefinitely because to destroy his credit is to interfere with his food for growth and development. The inherent evil in this type of legislation is a great danger to our national welfare. Nothing could be more paralyzing and corroding to our economic welfare than to sustain a law which unjustly takes from the citizen the fruits of his labor.

We have studiously sought to avoid the balancing of vested interest against human interest or the clash of capital with those financially distressed. We do not believe that there are any such matters involved in this case. We are asking to have stricken down legislation which the Constitution of the United States was enacting to protect every one against. Regardless of any transition or changing of our economic order, there still remains a fundamental protection afforded each citizen by this great document. Under this protection we are asking this court to nullify an act of Congress which so clearly contravenes the letter and the spirit of this Constitution.

Respectfully submitted,

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APPENDIX A.

(Public—No. 384—74th Congress.)

(S. 3002.)

AN ACT

To amend an Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, and Acts amendatory thereof and supplementary thereto.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 75 of said Act, as amended, be further amended by amending the second sentence of subsection (b), so as to read as follows: "The conciliation commissioner shall receive as compensation for his services a fee of $25 for each case submitted to him, and when docketed, to be paid out of the Treasury."

SEC. 2. That section 75 of said Act, as amended, be further amended by amending subsection (g) to read as follows:

"(g) An application for the confirmation of a composition or extension proposal may be filed in the court of bankruptcy after, but not before, it has been accepted in writing, by a majority in number of all creditors whose claims have been allowed, including secured creditors whose claims are affected, which number shall represent a majority in amount of such claims."

SEC. 3. That section 75 of said Act, as amended, be further amended by amending subsection (k) to read as follows:

"(k) Upon its confirmation, a composition or extension proposal shall be binding upon the farmer and his secured and unsecured creditors affected thereby: *Provided, however,* That such extension and/or composition shall not reduce the amount of or impair the lien of any secured creditor below the fair and reasonable market value of the property securing any such lien at the time that the extension and/or composition is accepted, but nothing herein shall prevent the reduction of the future rate of interest on all debts of the debtor, whether secured or unsecured."

SEC. 4. That section 75 of said Act, as amended, be further amended by amending subsection (n) to read as follows:

"(n) The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under section 75 of this Act, as amended, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.

"In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or

the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section. The words 'period of redemption' wherever they occur in this section shall include any State moratorium, whether established by legislative enactment or executive proclamation, or where the period of redemption has been extended by a judicial decree. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding same to the clerk of court."

SEC. 5. That section 75 of said Act, as amended, be further amended by amending subsection (p) to read as follows:

"(p) The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in section 75 of this Act."

SEC. 6. That section 75 of said Act, as amended, be further amended by adding a new subsection (s), after subsection (r), to read as follows:

"(s) Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this Act. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: Provided, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

"(1) After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided

for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

"(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property. Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interest may appear, in accordance with the provisions of this

Act, and may require such payments to be made quarterly, semiannually, or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.

"(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: Provided, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: Provided, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this Act. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act.

"(4) The conciliation commissioner, appointed under subsection (a) of section 75 of this Act, as amended, shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of subsection (s) of section 75 of this Act, and continue so to act until the case has been finally disposed of. The conciliation commissioner, as such referee, shall receive such an additional fee for his services as may be allowed by the court, not to exceed $35 in any case, to be paid out of the bankrupt's estate. No additional fees or costs of administration or supervision of any kind shall be charged to the farmer debtor when or after he amends his petition or answer, asking to be adjudged a bankrupt, under subsection (s) of section 75 of this Act, but all such additional filing fees or costs of administration or supervision shall be charged against the bankrupt's estate. Conciliation commissioners and referees appointed under section 75 of this Act shall be entitled to transmit in the mails, free of postage, under cover of a penalty envelope, all matters which relate exclusively to the business of the courts, including notices to creditors. If, at the time that the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession, and the property returned to the possession of such farmer, under the provisions of this Act. The provisions of this Act shall be held to apply also to partnerships, common, entirety, joint, community ownerships, or to farming corporations where at least 75 per centum of the stock is owned by actual farmers, and any such parties may join in one petition.

"(5) This Act shall be held to apply to all existing cases now pending in any Federal court, under this Act, as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding

the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges. Any farm debtor who has filed under the General Bankruptcy Act may take advantage of this section upon written request to the court; and a previous discharge of the debtor under any other section of this Act shall not be grounds for denying him the benefits of this section.

"(6) This Act is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate.

Approved, August 28, 1935.

(8625-C)

APPENDIX B.

Sec. 5167—Code of Virginia.

How such deed of trust construed and effect of certain words, therein; duties, rights, and obligations of the parties and beneficiaries; duties of clerks upon recordation:—

Every deed of trust to secure debts or indemnify sureties, except so far as may be therein otherwise provided, shall be construed to impose and confer upon the parties thereto, and the beneficiaries thereunder, the following duties, rights and obligations in like manner as if the same were expressly provided for by such deed of trust, namely:

(1) The deed shall be construed as given to secure the performance of each of the covenants entered into by the grantor as well as the payment of the primary obligation.

(2) The grantor shall be deemed to covenant that he will pay all taxes, levies, assessments and charges upon the property, including the fees and charges of such agents or attorneys as the trustee may deem advisable to employ at any time for the purposes of the trust, so long as any obligation upon the grantor under the deed of trust remains undischarged.

(3) The grantor shall be deemed to covenant that he will keep the improvements on the property in tenantable condition, whether such improvements were on the property when the deed of trust was given or were thereafter placed thereon.

(4) The grantor shall be deemed to covenant that no waste shall be committed or suffered upon the property.

(5) The grantor shall be deemed to covenant that in the event of his failure to meet any obligations imposed upon him then the trustee or any beneficiary may, at his option, satisfy the same; and the money so advanced with interest thereon shall be a part of the debt secured by the deed, in the event of sale to be paid next after the expenses of executing the trust, and shall be otherwise recoverable from the grantor as a debt.

(6) In the event of default in the payment of the debt secured, or any part thereof, at maturity, or in the payment of interest when due, or of the breach of any of the covenants entered into or imposed upon the grantor, then at the request of any beneficiary the trustee shall forthwith declare all the debts and obligations secured by the deed of trust at once due and payable, shall take possession of the property and proceed to sell the same at auction at the premises (or at such other place as the trustee may select) upon such terms and conditions as the trustee may deem best, after first advertising the time, place and terms of sale in such manner as the deed may provide, or, if as the trustee may elect, no notice to the grantor or his successor in title being required.

(7) If the property is located in a city, or in a county in which a city or part thereof is located, publication of the advertisement five times in a newspaper published in such city (the last insertion if desired on the day of sale) shall be deemed adequate; if not being intended, however, to declare that other and different advertisement may not in any case be deemed reasonable, nor to

prevent the trustee from giving the sale such additional advertisement as he may deem advisable.

(8) If the deed of trust itself provides a method of advertising, which may be done by using the words "advertisement required", or words of like purport, followed by the method agreed on, then no other or different advertisement shall be necessary, beyond what the deed calls for, though the trustee may, in his discretion, give further advertisement.

(9) The trustee may postpone the sale at his discretion, in such case giving such notice or advertisement of such postponement as he may deem reasonable. Without meaning to declare any other method unreasonable, when the advertisement is by publication in a newspaper the continuation thereof in the subsequent issues of such newspaper with a note of such adjournment appended shall be deemed adequate in the absence of contrary provision in the deed of trust.

(10) The trustee may require of any bidder at any sale a cash deposit of not exceeding one hundred dollars, (unless the deed of trust specifies a different maximum, which may be done by the words, "bidder's deposit of not more than . . . dollars may be required", or words of like purport), before his bid is received, which shall be refunded to the bidder unless the property is sold to him, otherwise to be applied to his credit in settlement, or should he fail to complete his purchase promptly to be applied to pay to the costs and expenses of sale and the balance, if any, to be retained by the trustee as his compensation in connection with that sale.

(11) If the sale be upon credit terms the deferred purchase money shall bear interest from the day of sale

and shall be secured by a deed of trust upon the property contemporaneous with the trustee's deed to the purchaser. The clerk of the court upon admitting to record the deed of such trustee conveying property held in trust shall note a reference to same on the margin of the deed book where the deed or other writing conveying the property to such trustee in trust is recorded, if the same can be found in his office.

(12) The trustee shall receive and receipt for the proceeds of sale, no purchaser being required to see to the application of the proceeds, and apply the same, first, to discharge the expenses of executing the trust, including a commission to the trustee of five per centum of the gross proceeds of sale; secondly, to discharge all taxes, levies, and assessments, with costs and interest, including the due *pro rata* thereof for the current year; thirdly, to discharge in the order of their priority, if any, the remaining debts and obligations secured by the deed, with lawful interest; and, fourthly, the residue of the proceeds shall be paid to the grantor or his assigns; provided, however, that the trustee as to such residue shall not be bound by any inheritance, devise, conveyance, assignment or lien of or upon the grantor's equity, without actual notice thereof prior to distribution.

(13) Upon discharge of all the debts, duties and obligations imposed by the deed upon the grantor, including any expenses incurred preparatory to sale, then upon the grantor's request the trustee shall execute and deliver a good and sufficient deed or release at the grantor's own proper costs and charges.

The following provisions may be incorporated in any such deed of trust in the respective short forms indicated, namely:

(a) The words "identified by trustee's signature", or words of like purport, shall be construed as if the deed set forth: "all of which said notes (or other obligations) bear the marginal signature of the trustee for the purpose of identification but for no other purpose whatever".

(b) The words "deferred purchase money", or words of like purport, shall be construed as if the deed set forth: "This deed of trust is a contemporaneous purchase money deed of trust and secures the payment of deferred purchase money due by the grantor upon the property hereby conveyed".

(c) The words "exemptions waived", or words of like purport, shall be construed as if the deed set forth: "The grantor hereby waives the benefit of his exemptions as to the debt hereby secured and as to all other obligations which may be imposed upon by the provisions of this deed of trust".

(d) The words "subject to call upon default", or words of like purport, shall be construed as if the deed set forth: "Should default be made in the payment of any payment of any part of the debt hereby secured, principal or interest, at the maturity of such part, or in the event of the breach of any of the covenants entered into or imposed upon the grantor, then the entire obligation of this deed of trust and the whole debt hereby secured shall, at the option of the beneficiaries, become forthwith due and payable."

(e) The words "renewal or extension permitted", or words of like purport, shall be construed as if the deed set forth: "The grantor hereby consents and agrees that the debt hereby secured, or any part thereof,

may be renewed or extended beyond maturity as often as may be desired by agreement between the creditor and any subsquent owner of the property, and no such renewal or extension shall in any way affect the grantor's responsibility, whether as surety or otherwise."

(f) The words 'right of anticipation reserved," or words of like purport, shall be construed as if the deed set forth: "The grantor reserves the right to anticipate the payment of the debt hereby secured, or any part thereof which is represented by a separate note, (or other obligation) at any interest period by the payment of principal and interest to the date of such anticipated payment only".

(g) The words "priority in direct order of maturity", or words of like purport, shall be construed as if the deed set forth: "The notes (or other obligations) hereby secured have priority amongst themselves in the direct order of their maturities, each having priority over all others falling due after its maturity." And the words, "priority in inverse order of maturity", or words of like purport, shall be construed as if the deed set forth: "The notes (or other obligations) hereby secured have priority amongst themselves in the inverse order of their maturities, each having priority over all others falling due before its maturity".

(h) The words "insurance required . . . dollars", or words of similar purport, shall be construed as if the deed set forth: "The grantor covenants that he will keep the improvements on the property insured against fire in some solvent insurance company approved by the trustee for the benefit of the beneficiaries hereunder in the sum of at least / . . dollars, and will deposit with the trustee the policies, with standard loss payable clausod (clause) with full contribution in favor of the

trustee as his interest may appear; and the grantor further covenants that in the event of his failure to keep the property so insured and the policies so deposited, then the trustee or any beneficiary may, at his option, effect such insurance and pay the premiums thereon, and the money so paid, with interest thereon, shall become a part of the debt hereby secured, in the event of sale to be paid next after the expenses of executing this trust, and shall be otherwise recoverable from the grantor as a debt; but there shall be no obligation upon the trustee or beneficary to effect such insurance."